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March 20, 1997

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MAR 20 1997

Federal Communications Commission
Office of Secretary

Mr. William Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

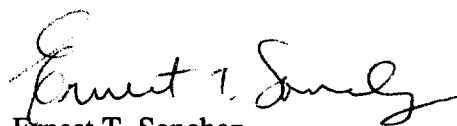
Re: In Re Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations
(Channel 264A at Honor, Michigan) (MM Docket No. 95-135, RM 8681)

Dear Mr. Caton:

Transmitted herewith, on behalf of Xavier University, applicant for Channel 264A at Honor, Michigan, is an original and four copies of the enclosed Motion for Leave to File Late Pleading and Opposition to Petition for Reconsideration, which is filed in opposition to a Petition for Reconsideration that had been filed by Roger L. Hoppe II, licensee of WZTU at Bear Lake, Michigan.

Please let me know if you have any questions about this filing.

Sincerely,



Ernest T. Sanchez
Counsel for
Xavier University

Enclosures

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RECEIVED
MAR 20 1997

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of

Amendment of Section 73.202(b))	
Table of Allotments)	MM Docket No. 95-135;
FM Broadcast Station)	RM 8681
(Honor, Michigan))	
)	

To: Chief, Allocations Branch
Mass Media Bureau

Motion for Leave to File Late Pleading and
Opposition to Petition for Reconsideration

Xavier University, an applicant for authorization to construct a new FM radio station on Channel 264A at Honor, Michigan (BPH-960719) (hereafter, "Xavier"), respectfully requests leave to file this Opposition ("Opposition") to a Petition for Reconsideration ("Reconsideration") that was filed on May 15, 1996 by Roger L. Hoppe II, licensee of WZTU, Bear Lake, MI. Mr. Hoppe's Petition sought reconsideration of a Report and Order issued by the Mass Media Bureau in the above-captioned proceeding which allotted FM Channel 264A to Honor, Michigan (DA 96-656) 11 FCC Rcd. 5301 (Report and Order, released May 6, 1996).

Although the Petition was filed on May 15, 1996, notice of its having been filed was not made public until December 3, 1996. Xavier acknowledges that, given that public notice date, this Opposition might not be considered timely filed. It seeks leave

to file, nevertheless, for the reason that neither Xavier nor its attorneys had actual notice of the filing of any Petition for Reconsideration. Nor did they have reason to suspect, the deadline for such petitions having passed and no public notice having appeared for over six months, that a Petition for Reconsideration might indeed have been filed during that period. Once the December 3, 1996 notice was brought to Xavier's attention, it acted expeditiously to determine what the facts of the situation were and to prepare this pleading. Thus, Xavier's delay in acting is excusable and should not be held to bar it from filing this Opposition.

Moreover, acceptance of this Opposition will not result in undue prejudice to Hoppe, inasmuch as he can be presumed to have been aware that one or more parties were likely to and, in fact, did respond to the Allocation of Channel 264A at Honor, Michigan by filing an application for that frequency. Public notice of Xavier's application appeared on August 2, 1996 (Broadcast Applications, Report No. 23794, 1996 FCC LEXIS 4123 (August 2, 1996), less than one month after the application was filed. Hoppe never made any attempt, however, to alert Xavier to the pendency of its Petition seeking reconsideration of a Report and Order.

Furthermore, Xavier will be prejudiced if it is not permitted to oppose the Petition, particularly in light of certain inaccurate factual allegations made by Petitioner. When Xavier responded (960719MA) to the Report and Order allocating Channel 264A for Honor, Michigan, no apparent reason existed to believe that an active counter-proposal was still pending, for it appeared from the public record as of July 19, 1996 (the deadline for filing for Channel 264A), that the counterproposal had been rejected

and no petition for reconsideration had been filed. Since that time, Xavier has acquired a site for its proposed antenna (see attached Declaration of James King and Exhibit 1 attached thereto) and is committed to proceed with that transaction. For these reasons, Xavier respectfully requests that the Opposition to Petition for Reconsideration be accepted for filing in the above-referenced matter.

OPPOSITION TO PETITION FOR RECONSIDERATION

The arguments advanced by Roger L. Hoppe II, licensee of WZTU, should be rejected and the Report and Order confirmed because Hoppe's Petition, like his previous one-step application to upgrade Station WZTU, fails to satisfy either substantive or procedural standards. Petitioner has premised his Petition on an alleged dating error in processing his application which, he states, resulted in its not being formally considered as a counterproposal.¹ However, as Xavier will demonstrate, regardless of the date upon which the Hoppe application was filed, Petitioner is not entitled to reconsideration for a number of reasons and would not, in any event, have prevailed even if his application had been formally treated as a counterproposal.

1. **Petitioner's One-Step Application Could Not Have Been Considered as a Counterproposal.**

As stated in *Rosendale, New York*, 10 FCC Rcd 11471, 11472 (MM Dkt. No. 93-17, RM-8170 (Report and Order)(1995), *aff'd on other grounds*, 11 FCC Rcd 3607

¹ According to the Report and Order, a one-step application was filed by Station WZTU for Bear Lake, Michigan, to substitute Channel 264C2 for Channel 261A, and was assigned the designation 951020ID. Petitioner argues that this was erroneous and that a corrected designation, 951018IF, was later assigned when the alleged error was brought to the Mass Media Bureau's attention. Some confusion may have resulted from the fact that a consultant for WZTU and Hoppe, Theodore G. Hammond, filed timely comments opposing the allocation and supporting the WZTU one-step application.

(1996): "Counterproposals must be technically and procedurally correct when filed and may not be amended at a later date." See also *Arlington, Texas, et al.*, 8 FCC Rcd 4281 (1993); *Hondo, Texas, et al.*, 7 FCC Rcd. 7610 (1992); *Flora, Mississippi, et al.*, 7 FCC Rcd 5477 (1992). This rule must be applied here to disqualify the Hoppe/WZTU one-step application from consideration as a counterproposal.

As the attached Exhibit 2 (a letter from Hoppe's counsel and a statement from Hoppe regarding an omitted exhibit) demonstrates, Hoppe and WZTU sought to amend that one-step application on October 26, 1995 (951026IB), a full seven days after the October 19, 1995 deadline established for filing comments on this proposed allocation. The Hoppe/WZTU amendment was, it states, filed in order to add an exhibit that had been omitted from the one-step application. That application was not, therefore, complete when filed. The cover letter from Hoppe's counsel specifically referred to the October 26 filing as an "amendment to that [one-step] application." Since the one-step application was amended, and that amendment was submitted well after the deadline for comments, it cannot receive consideration as a counterproposal to the Honor allocation. As noted in *Rosendale, New York* (*supra*, at 11472, n. 4), "the Commission's rules do not contemplate the filing of pleadings beyond the comment periods set forth in the notice."

Thus even if, *arguendo*, the Hoppe/WZTU one-step application was not properly processed or dated, Hoppe/WZTU would not be prejudiced by any failure to give that application formal consideration as a counterproposal. The application was not entitled to such consideration. Because it was incomplete when filed and because it was amended after the close of the comment period, it was ineligible for such consideration.

2. Hoppe/WZTU Are Not Prejudiced Because the One-Step Application Was Considered and Rejected on Its Merits in the Report and Order.

Although the one-step application was not accorded counterproposal status, the Report and Order did, nevertheless, take the merits of the application into consideration as if it were a counterproposal. In doing so, the Report and Order specifically found that Hoppe's application would not have prevailed even if it had it been formally so considered. A number of filings were made by or on behalf of Hoppe and/or WZTU in this proceeding. Theodore G. Hammond, who identified himself as a "consultant" and "the preparer of the technical exhibits in the [Hoppe/WZTU] one step application", filed extensive Comments in opposition to the Honor allocation. As Hammond specifically stated in those Comments, they "contain[ed] arguments and technical exhibits in favor of the counterproposal to the proposed rulemaking submitted by Roger L. Hoppe, II to upgrade WZTU by one step application to Channel 264C2 at Bear Lake, MI, which is mutually exclusive with this proposed rulemaking, and are intended to amplify and supplement this counterproposal." Hammond Comments, at page 1. The Report and Order acknowledged this connection and went on to discuss the Comments in some detail before rejecting on their merits the arguments Hammond made there.

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Honor, Michigan), (MM Docket No. 95-135, RM-8681) 11 FCC Rcd 5301, 5302 (Report and Order) (May 6, 1996) (hereafter, "*Honor, Michigan*").

Moreover, the Report and Order nevertheless treated the application as a counterproposal, stating that:

[W]e recognize that had the application been timely as a counterproposal, the conflicting proposals would have been comparatively considered under the guidelines set forth in Revision of FM Assignment and Procedures, 90 FCC 2d 88 (1982). The allotment at Honor constitutes a first local service under priority (3) while the upgrade at Bear Lake falls under priority (4), other public interest matters. It is Commission policy that a modification of a license to upgrade facilities . . . does not provide as great a public service benefit as that of a new primary service. See *Andalusia, Alabama*, 49 Fed Reg. 32201, published August 13, 1984, and *Queensbury, New York*, 5 FCC Rcd 3243 (1990).
Honor, Michigan, *supra* at 5302.

Thus, despite the belief that the application was untimely, Hoppe/WZTU were given full consideration on the merits as if it were a counterproposal both directly and through consideration of the Hammond supporting Comments. Hoppe has already had a sufficient number of bites of this particular apple and its not entitled to another.

3. **Given the Commission's Comparative Allotment Criteria, It Would Be a Futile Exercise to Reconsider the One-Step Application as a Counterproposal.**

The Commission's FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; (4) other public interest matters. *Revision of FM Assignment Procedures*, 90 FCC 2d 88 (1982). The straightforward and accurate comparison of the Honor allocation versus the one-step upgrade for Bear Lake, that was made in the *Honor, Michigan* Order indicates what the ultimate result would be if the Petition for Reconsideration were to be granted. The Order states that "it is Commission policy that the modification of a license to upgrade facilities to a superior channel does not provide as great a public service benefit as that of a new primary service." *Id.*, at 5301-5302. Since this policy would apply in any comparative hearing that might occur, Hoppe is hardly prejudiced by the that decision and would not benefit from empty and futile proceedings which would inevitably have the same result.

4. **Petitioner's Allegations Regarding the Allocated Site Were Not "Cavalierly Rejected."**

Petitioner claims that the Report and Order "cavalierly rejected" the Hammond Comments' alleged "demonstration" that the site selected "was located in the Pere Marquette Forest, and was close to a new airport." The rejection of this argument was not cavalier. Rather, it was clearly rejected because it was not supported by adequate documentation as is required by the Commission's rules. Hammond's Comments state that he "believes . . . that the reference coordinates specified in the proposed rulemaking . . . are in the Pere Marquette State Forest" and that he "has been advised" about an alleged tower moratorium in the area, and ends by stating "it is doubtful that the Honor facility . . . could ever be built." [Hammond Comments, at 7th and 8th page (the pages are not numbered)].

The defect in this argument is readily apparent: it is not a "demonstration" at all but, rather, "nothing more than pure, unadulterated speculation, conjecture, innuendo, and surmise." *Folkways Broadcasting Co., Inc.*, 33 FCC 2d 806, 811 (Rev. Bd. 1972); see also *The Lutheran Church, Missouri Synod*, 10 FCC Rcd 9880, 9919 (1995) and *Artichoke Broadcasting Corp., et al.*, 10 FCC Rcd 12631 (Comm. Mem.Op. and Order)(1995)(hereafter, "*Artichoke*"). As the Report and Order stated, Hammond offered no evidence of his speculative claims. Significantly, Petitioner has still not corrected that fatal defect -- the Petition for Reconsideration contains no documentation of these allegations, not even an affidavit or declaration attesting to them. Petitioner cannot realistically expect the Commission or its staff to act on the basis of unsupported allegations.

Furthermore, it is far too early in the proceedings for site availability issues to be raised. As the Commission explained in its *Artichoke* ruling, "supposition or opinion" on site availability are no more than "conjectural and speculative" at early stages in a proceeding. The Commission specifically noted that it "has not generally required applicants to obtain, or apply for, advance zoning approval by local land use authorities" to support site availability certification. *Artichoke, supra*, at 12633-34.

Finally, Hammond's allegations were not only speculative but inaccurate. Attached hereto, as Exhibit 1 to the Affidavit of James King, Xavier's Director of Radio, is a copy of a document entitled "Property Transfer Affidavit", which indicates that Xavier has contracted to purchase land in Benzie County as an antenna site and, as he attests, that land is not located within the Pere Marquette Forest.

5. **WZTU will not be adversely affected by the allocation to Honor, Michigan**

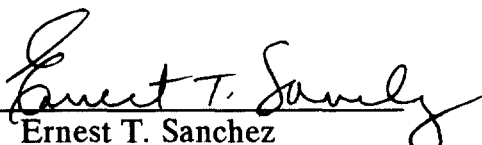
As the Report and Order states, the required site restriction 3 kilometers north of the community of Honor "will prevent short-spacing to Station WZTU, Channel 261A, Bear Lake, Michigan." *Honor, supra*, at 5302. Thus, Hoppe's concerns about short-spacing can be addressed while still permitting the new allocation for new local service at Honor. Also, the Report and Order noted that Hoppe/WZTU would "be given an opportunity to amend its application to specify a nonconflicting site" as an alternative to its one-step application for Channel 264C2. If, on the other hand, the Petition were granted, other parties, such as Xavier, who acted in reliance upon the Report and Order (and the apparent lack of any petition for reconsideration as of July 19, 1996), **would be** adversely affected if WZTU were allowed to turn the clock back at this stage.

Conclusion.

WZTU and its licensee, Roger L. Hoppe II, have not presented a case which warrants reconsideration. Whether or not their allegations regarding filing dates and processing are accurate, the application was not entitled to consideration as a counterproposal inasmuch it clearly was incomplete on **whichever date** it was originally filed and, consequently, had to be amended a full week later. Furthermore, it could not have prevailed on the merits in any event for the reasons stated above. Xavier respectfully requests, therefore, that the Petition for Reconsideration be denied and that these proceedings with respect to award of the construction permit for Channel 264A at Honor, Michigan, be permitted to continue without further delay.

Respectfully submitted,

XAVIER UNIVERSITY

By 
Ernest T. Sanchez
Its Attorney

Ernest T. Sanchez
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 237-2814

Dated: March 20, 1997

CERTIFICATE OF SERVICE

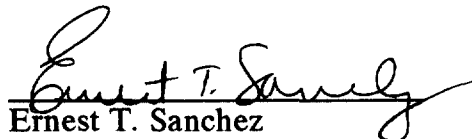
I, Ernest T. Sanchez, counsel for Xavier University, do hereby certify that a true and correct copy of the foregoing "Opposition to Petition for Reconsideration" of Xavier University was served on this 20th day of March, 1997, by U.S. Mail, first-class, prepaid postage, on the following individuals:

James A. Koerner, Esq.
BARAFF, KOERNER & OLENDER, P.C.
Three Bethesda Metro Center
Suite 640
Bethesda, Maryland 20814

Ms. Jacqueline F. Bourgard
P.O. Box 365
Mesick, Michigan 49668

Harry C. Martin, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street
11th Floor
Rosslyn, Virginia 22209-3801

John A. Karuosos, Esq.
Chief, Allocations Branch
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554


Ernest T. Sanchez

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

DECLARATION UNDER PENALTY OF PERJURY OF JAMES KING

Declarant, James King, under penalty of perjury, affirms and attests as follows:

1. My name is James King. I am the Director of Radio of Xavier University, the applicant for Channel 264A in Honor, Michigan. I am competent to testify to the matters set forth in this Declaration.

2. Attached hereto as Exhibit 1 is a copy of a Property Transfer Affidavit executed by John R. Hirte, Vice-President of Xavier University, a document that was filed by Xavier University with the assessor for the township of Inland in Benzie County, Michigan. This document was filed in connection with Xavier's agreement to purchase a parcel of land located in Benzie County as a site for the antenna to be constructed if it is awarded the construction permit for Channel 264A in Honor, Michigan. To the best of my knowledge and belief, this property is not located in Pere Marquette State Forest.

3. I further certify that I have reviewed the Motion for Leave to File Late Pleading and Opposition to Petition for Reconsideration that is being filed by Xavier University and to which this Declaration is attached, and likewise certify that all statements of fact and factual assertions contained therein are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.


James King

Executed on March 20, 1997.

EXHIBIT 1

PROPERTY TRANSFER AFFIDAVIT

This form is issued under authority of P.A. 415 of 1994. Filing is mandatory.

This form must be filed whenever real estate or some types of personal property are transferred (even if you are not recording a deed). It is used by the assessor to ensure the property is assessed properly and receives the correct *taxable value*. It must be filed by the new owner with the *assessor for the city or township* where the property is located within **45 days** of the transfer. If it is not filed timely, a penalty of \$5/day (maximum \$200) applies. The information on this form is not confidential.

1. Street Address of Property 15323 Stanley Road	2. County Benzie	4. Date of Transfer (or land contract was signed) 1/20/97
3. City/Township/Village of Real Estate Inland	<input type="checkbox"/> City <input checked="" type="checkbox"/> Township <input type="checkbox"/> Village	5. Purchase Price of Real Estate \$18,000.00
6. Property Identification Number (PIN). If you don't have a PIN, attach legal description. 10-08-018-006-67		7. This number ranges from 10 to 25 digits. It usually includes hyphens and sometimes includes letters. It is on the property tax bill and on the assessment notice.

7. Seller's (Transferor) Name Donia McCaffrey	8. Buyer's (Transferee) Name and Mailing Address Xavier University 3800 Victory Parkway Cincinnati, Ohio 45207
--	---

Items 9 - 13 are optional. However, by completing them you may avoid further correspondence.

Transfers include deeds, land contracts, transfers involving trusts or wills, certain long-term leases and interest in a business. See the back for a complete list.

9. Type of Transfer <input type="checkbox"/> Land Contract <input checked="" type="checkbox"/> Deed <input type="checkbox"/> Other (specify)	10. Is the transfer between related persons? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	11. Amount of Down Payment -0-
12. If you financed the purchase, did you pay market rate of interest? N/A <input type="checkbox"/> Yes <input type="checkbox"/> No	13. Amount Financed (Borrowed) -0-	

Exemptions

The Michigan Constitution limits how much a property's *taxable value* can increase while it is owned by the same person. Once the property is transferred, the *taxable value* must be adjusted by the assessor to 50 percent of the property's usual selling price. Certain types of transfers are exempt from adjustment. Below are brief descriptions of the types of exempt transfers; full descriptions are in MCL Section 211.27a(7)(a-m). If you believe this transfer is exempt, indicate below the type of exemption you are claiming. If you claim an exemption, your assessor may request more information to support your claim.

- ☐ transfer from a spouse
- ☐ change in ownership solely to exclude or include a spouse
- ☐ transfer subject to a life lease or life estate (until the life lease or life estate expires)
- ☐ transfer to effect the foreclosure or forfeiture of real property
- ☐ transfer by redemption from a tax sale
- ☐ transfer into a trust where the sole beneficiary is the settlor (creator of the trust) or the settlor's spouse
- ☐ transfer resulting from a court order unless the order specifies a monetary payment
- ☐ transfer creating or ending a joint ownership if at least one person is an original owner of the property (or his/her spouse)
- ☐ transfer to establish or release a security interest (collateral)
- ☐ transfer of real estate through normal public trading of stocks
- ☐ transfer within an entity under common control or affiliated group
- ☐ transfer resulting from transactions that qualify as a tax-free reorganization
- ☐ other, specify:

Certification

I certify that the information above is true and complete to the best of my knowledge.


Owner's Signature 	Date 1/15/97	If signer is other than the owner, print name and title. John R. Hirte, Vice-President Xavier University
--	-----------------	--

EXHIBIT 2

951026TB
BARAFF, KOERNER, OLENDER & HOCHBERG, P.C.

ATTORNEYS AT LAW

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OF COUNSEL
B. JAY BARAFF*
ROBERT BENNETT LUBIC*

PROCESSED
FAX (301) 986-4844

OCT 26 1995

*NOT ADMITTED IN MD

October 26, 1955

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

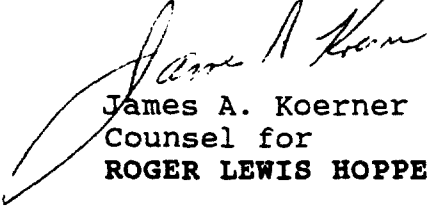
RE: ~~Station WSTU~~
Bear Lake, Michigan
File No. BPH-951018--

Dear Mr. Caton:

On behalf of Roger Lewis Hoppe II, the above-referenced application to change frequency, class, power, transmitter location, etc. was filed on October 18, 1995. Transmitted herewith in triplicate is an amendment to that application to supply an inadvertently omitted exhibit. Please associate this amendment with the application.

Should additional information be necessary in connection with this matter, please communicate with this office.

Very truly yours,


James A. Koerner
Counsel for
ROGER LEWIS HOPPE II

Enclosures

cc: Ms. Jacqueline F. Bourgard (w/ encl.)

JAK:lmb

a:\26171.00\fccwztu.026

Federal Communications Commission
Washington, D.C. 20554

RE: WZTU
Bear Lake, Michigan

Ladies and Gentlemen:

On October 18, 1995, Roger Lewis Hoppe II filed an application to change frequency, class, etc. for Station WZTU, Bear Lake, Michigan. Inadvertently, Exhibit V-B Q15 was omitted. That Exhibit is attached.

Respectfully submitted,

Roger L. Hoppe II 10/20/95